CRJOV (3)

Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

SECOND APPEAL NO. 131 /2004

APPELLANT : Munshiram, S/o Mangal Singh, aged 40 years, Occupation-Agriculturist, R/o Village-Hargaon, Tahsil Saja, District Durg (C.G.)
APPELLANT (in first appeal)
PLAINTIFF

-VERSUS-

RESPONDENTS :
RESPONDENTS (in first appeal)
DEFENDANTS

1. Inder Singh, S/o Mangal Singh, aged 45 years, R/o Ward No. 9, Punjabi Para, Bemetara, District Durg (C.G.).

2. Dhananjay Singh, S/o Anjor Singh, aged 35 years, Occupation-Agriculturist, R/o Village Padumsara, Tahsil Bemetara, District Durg (C.G.)

3. Vikas Kumar, S/o Mastram, aged 23 years, R/o Khariar Road, C/o House of Rampyari Chawla, Patel Nagar Bara, Khariar Road, District Kalahandi (Orissa)

4. Smt. Surjit Kaur, Widow Mastram, aged about 40 years, R/o Khariar Road, C/o House of Rampyari Chawla, Patel Nagar Bara, Khariar Road, District Kalahandi (Orissa)

5. Smt. Shobha Devi, W/o Rawatmal Lodha, aged 37 years, House No. 33-A, Jokhanbag, Jhansi, District Jhansi (U.P.)

6. Smt. Sunita Gumbar, W/o Shriram Gumbar, aged 26 years, Ward No. 4, Bemetara, District Durg (C.G.)

C.R. No. 560/04
Presented by Shri Jindagar Sahu
dated 26.02.04

Valuation of appeal : Rs. 300/- (As in Courts below)
Court fee paid : Rs. 30/- (As in Courts below)

SECOND APPEAL UNDER SECTION 100 OF THE CODE OF CIVIL PROCEDURE

(17)

HIGH COURT OF CHHATTISGARH, BILASPUR

Single Bench:- Hon'ble Shri Justice Dhirendra Mishra

Second Appeal No. 131 of 2004

Appellant :- Munshiram

Vs

Respondents :- Inder Singh & Others

Appellant by Shri Neeraj Shrivastava, Advocate.

JUDGEMENT
(Delivered on 09/03/2005)

Heard on admission.

2. This is the second appeal against the judgement and decree dated 19th October, 2003 passed by IInd Additional District Judge, (F.T.C.), Bemetara and by which the appeal of the appellant was dismissed and judgement and decree dated 31.07.1998 passed by Civil Judge, Class-I, Bemetara, has been confirmed. (Parties hereinafter shall be described as per their description in the trail Court.)

3. The undisputed fact is that the plaintiff, defendant No.1 and late Mastram were real brothers whereas defendant No.3 is the son and defendant No.4 is the widow of Mastram. The plaintiff filed a suit for declaration of 1/3rd share and separate possession of the land described in schedule-5 appended with the plaint. The oral partition of the ancestral property took place between the members of the family on 10.04.1976. The property described in schedule-5 was purchased by the plaintiff and his two brothers on 07.01.1964 by a registered sale deed. There was a dispute between Mastram and plaintiff regarding the division of agricultural produce resulting in *Marpeet* and death of Mastram and plaintiff was convicted for murder of Mastram. However, the ancestral property which is subsequently acquired property, situated in Bemetara, Durg road continued to be a joint property and accordingly, the property continued to be recorded jointly in the name of three brothers and their mother Smt. Kartar Devi

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in the revenue records. However, when the plaintiff was in jail in connection with murder of Mastram, defendant No.1 Inder Singh transferred the above property to defendant No.2 by a registered sale deed on 3rd July 1982. The plaintiff contends that as in the suit plot, the plaintiff, defendant No.1 and deceased Mastram each had 1/3rd share, the sale deed executed in favour of defendant No.2 is illegal and not binding on the plaintiff. On this pleading, a prayer for declaration and separate possession that the plaintiff is entitled for 1/3rd share was sought and pleaded that possession of defendant No. 2 in the remaining 2/3rd share is illegal and further mesne profit at the rate of Rs.100/- monthly from the date of institution of suit till the delivery of possession was prayed.

4. Defendant Nos. 1, 3 and 4 in their joint written statement denied the averments of the plaint except the admitted facts. The case of defendant Nos. 1, 3 and 4 was that initially the plaintiff and his brothers were residing jointly, however, the plaintiff and deceased Mastram separated defendant No.1 Inder Singh by allotting the shop, house and plot, situated in Bemetara and the suit land and the plaintiff and deceased Mastram were given rest of the property of the family situated in four villages including the house, courtyard and badi etc situated in village Hatgaon and on this properties, defendant No.1 Inder Singh was not given any share. Accordingly, the suit lands mutated in the name of defendant No.1, were subsequently legally sold by him through a registered sale deed to defendant No.2. Defendant No.2 sold this property to Dr.Tawri who is in possession of the said property.

5. The defence of the defendant No.2 was that defendant No.1 was the owner of the suit property which he purchased and obtained possession for a full consideration of Rs.49,000/-. Apart from the written statement, defendant Nos. 1, 3 and 4 filed a counterclaim claiming that defendant No.3 and 4 are entitled for ½ share over the property described in paragraph 12 of the plaint and further that they are the owners of the property described in paragraph-5(A) which has been illegally encroached by the plaintiff. Accordingly, a decree for declaration of ½ share and possession over the property described in paragraph-5(A) and in paragraph-13 was prayed.

6. In reply to the counterclaim, the plaintiff stated that the property situated in village Roudra was allotted in his share in the family partition and since then, he is in possession.

7. That, on the basis of the pleadings of the parties, issues were framed by the trial Court and the suit of the plaintiff was dismissed by recording a finding that the suit property is not the joint property of the plaintiff, defendant No.1 and Mastram and the plaintiff is not entitled for separate possession after partition of 1/3rd share of the suit property and further that the plaintiff has failed to prove that the sale deed dated 02.07.1982 executed in favour of defendant No.2 by defendant No.1 was unauthorized and that the sale deed is binding on the plaintiff also. It was also held that defendant No.2 purchased the property bonafidely after verification of the title by paying due consideration and the title of defendant No.2 is protected as per provisions of Section 41 of Transfer of Property Act (hereinafter referred to as 'Act') and that of defendant Nos. 5 & 6. The counterclaim preferred by defendant Nos. 1, 3 and 4 was also held to be not proved and accordingly, the suit was dismissed.

8. Learned trial Court dismissed the suit of the plaintiff on the ground that the case of the plaintiff is that there was oral partition on 10.04.1976 of the ancestral property. However, the suit property was not included in the partition and it continued to be joint property and he was paying land revenues of the suit property before 1981. However, no legally admissible document has been filed by the plaintiff and he came to know about the sale of the suit property only in the year 1984-85. The plaintiff has admitted the mutation proceedings conducted before Tehsildar, Saja and in the Statement of Ex.D/1, the plaintiff has stated that there was a partition between the brothers some ten years before and according to that partition, the land situated in villages, Ghotmarra, Roudra and Hatgaon admeasuring 15 to 16 acres of land, was allotted to his share whereas deceased Mastram was also allotted the land situated in village Ghotmarra, Bhedni and Hatgaon and defendant No.1 Inder Singh was given the shop, plot and house situated in Bemetara. The plaintiff has further admitted that he has applied for mutation for the land allotted to his share. An agreement of partition was executed in the year 1976 in which all the three brothers has signed in presence of witnesses namely Sant Singh, Kartar Singh and mother Smt. Kartar Devi. He also admitted that he has given a document for filing in the Court to his Advocate. However, no such document has been filed by the plaintiff in the Court and thus, the Court below on the basis of statement of the plaintiff and further for not filing any document, has drawn adverse inference against the plaintiff that had he filed those documents, it would have adversely affected the case of the plaintiff.

9. On the other hand, the defendants and their witnesses have stated that oral partition took place in the presence of witnesses namely Atma Ram, Seeta Ram, Kartar Singh, mother Kartar Devi and Sant Singh. Learned trial Court relying upon the oral statements of the witnesses of the defendants and further relying upon the statement of D.W.1 Inder Singh who is also supported by document of Ex.D/1 and which is also supported by the statement of D.W.2 Atma Ram, 80 years old, has arrived to the conclusion that there was an oral partition in the year 1976 of the suit property and the suit land was allotted to the share of defendant No.1. A presumption has been further drawn by the trial Court against the plaintiff for not filing agreement of partition, which was in his possession, on the basis of which, the mutation order of Ex.D/12 was passed in favour of defendant No. 1 of the suit land.

10. Learned trial Court has further held that the suit property was the property of the share of defendant No.1 Inder Singh and he authorized the same to defendant No.2 and that defendant No.2 after due verification and due care purchased the suit property bonafidely from defendant No.1, the owner of the suit property as before purchasing the property. Defendant No.2 had issued a public notification on 23rd June 1982 in "Daily Navbharat" inviting objections against the proposed sale and when no objections were received, he purchased the same by a registered sale deed. For the above reasons, the learned trial Court has arrived to the conclusion that defendant No.1 was entitled for protection of Section 41 of Act. Accordingly, the suit of the plaintiff was dismissed by the trial Court.

11. Learned first Appellate Court agreeing with the findings of the learned trial Court, dismissed the suit of the plaintiff on the ground that the plaintiff has failed to prove that the suit land was not subjected to partition though the other properties were duly partitioned amongst the brothers of the plaintiff in the year 1976.

12. That, the learned counsel for the appellant has assailed the judgement and findings of both the Courts below on the ground that learned Additional District Judge, Bemetara has confirmed the findings of the trial Court without discussing the evidence available on records simply by mentioning in paragraph-11 and 12 of the impugned judgment that he is in agreement with the findings of the Civil Judge as the same are not baseless and no further discussion on the statements of witnesses is required in the appeal.

13. Learned counsel for the appellant submits that the first Appellate Court is a final Court of facts and without discussing the facts, the judgment of the trial Court, has been confirmed causing great prejudice to the plaintiff. Thus, the first Appellate Court has failed in properly exercising the jurisdiction in deciding the appeal by refraining itself from appreciation of evidence. The other ground taken by the appellant is that the finding of both the Courts below that the plaintiff has failed to adduce evidence to establish that the suit property was not partitioned is unjustified. It is further argued that the Courts of law have drawn adverse inference against the plaintiff for not filing agreement of partition entered into between the parties in the year 1976 and at the same time, on the basis of document of Ex.D/12, a finding has been recorded that there was some agreement between the parties on the basis of which, the suit property was recorded in the name of defendant No.1 and thus, both the findings are contradictory in terms.

14. I have heard learned counsel for the appellant at length.

15. The contention of the appellant that the first Appellate Court without appreciating the evidence available on record in detail, could not have confirmed the decree passed by learned trial Court, appears to be fallacious. After going through the judgment of the trial Court, the first Appellate Court arrived to the conclusion that the reasoning of the trial Court for dismissing the suit of the plaintiff is based on proper appreciation of the evidence and further reiterating the same arguments in the appellate judgement is of no consequence, as has been held by the Supreme Court in the matter of ***Girijanandini Devi and others Vs. Bijendra Narain Choudhary*** reported in ***AIR 1967 Supreme Court 1124, paragraph-12***. Learned counsel for the appellant could not cite any judgment in support of his contention.

16. The findings of both the Courts below that the plaintiff has failed to prove that the suit property was not partitioned and remained joint property of the three brothers is based on sound appreciation of the evidence available on record. So far as the contention of the plaintiff that both the learned Courts below have illegally drawn adverse presumption against the plaintiff for not filing agreement is concerned, it is not proper. The case of both the parties is that there was a partition in the year 1976 which was reduced in writing and the plaintiff has also admitted this in his plaint as well as in his statement also. Now, it was the case

of the plaintiff that the suit land was excluded from the partition. It was the onus of the plaintiff to establish his contention that the suit land was excluded from the partition and the agreement would have been the best piece of evidence to establish this which is admittedly in possession of the plaintiff and thus, learned both the Courts below have correctly drawn adverse inference against the plaintiff for non filing of the above document as the same would have against the cause of the plaintiff, had it been filed.

17. The submission of the counsel for appellant that the document of Ex.D/12 is based on the said agreement and therefore, it was the onus of the defendants to file that document is of no consequence because by the document of Ex.D/12, it is only established that there was some agreement entered into between the parties on the basis of which order of Ex.D/12 was passed.

18. Thus, the above two contentions of the counsel for the appellant, do not have any force. As far as the third question of law proposed by the appellant that whether the Courts below have correctly held that defendant No.2 and subsequently defendant Nos. 5 and 6 are entitled for protection under Section 41 of the Transfer of Act, was legally justified is concerned, as already mentioned in the foregoing paragraphs, defendant No.2 verified the titled of defendant No.1 over the suit property who was duly recorded owner of the said property on the date of purchase. He also tried to verify the title of defendant No.1 by publication of public notice, inviting objections against the proposed sale and therefore both the learned Courts below have not committed any illegality in holding that defendant No.2 is the bonafide purchase of the property from defendant No. 1, the owner of the property and is entitled for protection under Section 41 of Act.

19. Thus, on the basis of aforesaid discussions, I do not find any substantial questions of law involved for adjudication of this second appeal and the appeal deserves to be dismissed at motion stage and it is dismissed accordingly.

Sd/-
DHIRENDRA MISHRA
Judge